

**JUN 18 2003**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

HERACLIO S. RODRIGUEZ,

Petitioner - Appellant,

v.

ROBERT AYERS,

Respondent - Appellee.

No. 02-56112

D.C. No. CV-01-03113-AHS

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Alicemarie H. Stotler, District Judge, Presiding

Submitted June 2, 2003\*\*  
Pasadena, California

Before: THOMAS and PAEZ, Circuit Judges, and REED, District Judge.\*\*\*

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

\*\*\* The Honorable Edward C. Reed, Jr., Senior District Judge for the District of Nevada, sitting by designation.

In light of our recent decision in *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003), which we had not yet issued at the time the district court considered Rodriguez’s habeas petition, and in which we held that California’s “untimeliness bar” is an independent but *not* an adequate state procedural ground, we reverse the district court’s denial of Rodriguez’s habeas petition and remand to the district court for a determination of whether California’s “untimeliness bar” was an adequate state procedural ground. In making this determination, the district court should consider that the State, and not Rodriguez, bears the burden of proving that the state procedural bar applies. *See Bennett*, 322 F.3d at 584–86.

REVERSED AND REMANDED.